least heavily congested, if not completely occupied, by existing licensees in every major market area in the United States. There is limited, if any, spectrum which is unlicensed and otherwise available in the MTAs proposed by the Commission. Southern submits that there are no contiguous blocks of spectrum in these areas which are completely free from licensees, so as to make them suitable for the Commission plan. The proposed distribution of channel blocks, therefore, would not license spectrum but, at best, marketing rights, a result not authorized by statute and not necessary to serve any Congressional purpose.

29. To the extent that there is "white space" in the 800 MHz spectrum, it is available to applicants under the existing regulatory framework. The Commission's proposal is not necessary to permit access to unlicensed spectrum. Indeed, the proposal is not necessary to permit utilization of contiguous spectrum by one licensee. An applicant who desired to compile a contiguous spectrum block could attempt to do so now by applying for unlicensed channels and negotiating with incumbent licensees for access to occupied channels.

30. The Commission's proposal would have the effect of diminishing or eliminating free market forces from this process. Currently, the price of negotiated movement by existing licensees is a function of: (1) the value to the incumbent of retaining the frequency and (2) the value to the applicant of gaining the frequency. If an applicant's proposed use of the frequency is not expected to yield a return sufficient to justify the incumbent's asking price, the market will not bear the transaction. In such a case, the most efficient market condition, as dictated by the market, is the status quo. Under the proposed spectrum block plan, frequencies would be artificially lumped together and concentrated giving the ultimate purchaser[s] value, and a competitive advantage, which were not dictated by market forces.

31. Southern submits, therefore, that the current regulatory scheme best fosters real free market competition and best serves the SMR industry and the public. MTA-type licensing can be achieved by simply allowing wide-area SMR licensees to certify the geographic area (i.e. footprint) they serve. While this approach may lack preciseness, it recognizes and preserves existing systems and the investment they represent.

IV. NEXTEL'S COMMENTS VIOLATE THE ADMINISTRATIVE PROCEDURE ACT, ARE ANTICOMPETITIVE AND CONTRARY TO THE PUBLIC INTEREST

A. Major New Proposals Are Not Appropriately Raised in the Comment Phase of a Rule Making

32. The focus of this proceeding is to develop a licensing scheme for licensing wide-area SMR systems operating in the 800 MHz band. The Commission is merely attempting to accommodate wide-area SMR systems by isolating their operations into an frequency band already allocated for SMR use. The Commission also sought comment on where it should draw the line (as far as access to General Category ("GC") and Pool frequencies are concerned) between SMR and non-SMR licensees. Nextel takes a quantum leap from the Commission's general inquiry on where the line should be drawn to seeking to reallocate all GC and Business Category frequency bands for use only by SMR licensees displaced from the upper 200 channel block. This proposal is a complete spectrum reallocation, a concept not contemplated by the Commission in the FNPRM. Hence, Nextel's Comments in this regard are beyond the scope of this proceeding.

33. Specifically, Nextel proposes to create a "new SMR block" comprised of the 150 GC channels and the 50 Business Category channels. Currently, GC channels are open to all

entities including SMRs. Likewise, the eligibility for Business channels is open to entities engaged in commercial activity. In both instances, these channels are not designated for SMR use only. Under Nextel's plan, the GC and Business channels eligibility would be redesignated for "relocated" SMR use only.[39/] Accordingly, the spectrum would be reallocated jeopardizing the existing non-SMR operations on these frequencies as well as freezing out any new SMR licensees. Non-SMR entities currently operating on these channels, according to Nextel's Comments, could no longer apply for additional GC or Business channels to modify or expand their existing operations.[40/] Nextel also proposes that these channels be designated as the replacement spectrum home for SMR licensees operating on the upper 200 SMR channels who will be forced to relocate to other spectrum.[41/] In essence, Nextel proposes a new function and purpose for these frequencies that is different from the current FCC rules or the FNPRM.

34. Nextel's spectrum reallocation proposal affects 800 MHz licensees other than SMRs. Since Nextel proposes to

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[39/] Comments of Nextel at 9 and note 15.

[40/] Id. at 37-38.

[41/] Id. at 35-36.

reallocate non-SMR spectrum (e.g. 50 Business Category channels), 800 MHz licensees that currently have access to this spectrum are also affected by this action. As discussed below, these entities should be put on notice and afforded the opportunity to comment on Nextel's proposal.

35. The only way that Nextel's relocation/reallocation plan can be implemented is for the Commission to adopt new rules to reallocate the GC and Business Category frequencies. In order to have contiguous 200 SMR channels for wide-area use based on already-licensed spectrum, an MTA licensee must relocate the existing licensees operating in these frequencies.[42/] Additionally, to facilitate the relocation process, Nextel needs additional spectrum to move these displaced licensees. Enter the Nextel concept of a "new SMR spectrum block." To accomplish its plan, Nextel urges the Commission to reallocate the non-SMR channels for "relocated" SMR use only.

36. As indicated above, this proceeding is to determine the licensing procedures for the remaining 800 MHz SMR spectrum, and not one to make major changes in the allocated spectrum for GC, Business or I/LT eligibles.

[42/] Id. at 27-32.

Therefore, Nextel's Comments and its proposed plan, which is totally dependent on a spectrum reallocation plan, are beyond the scope of this proceeding. As such, the Commission must require Nextel to adhere to the APA requirements by filing a separate Petition for Rule Making, or the Commission must adopt yet another FNPRM advancing Nextel's new plan. Indeed, the instant proceeding is derived from an earlier attempt by Nextel to short-cut APA requirements. In the FNPRM, the Commission noted that in the CMRS Further Notice, Nextel filed Comments proposing a plan (in essence, the introduction to Nextel's plan in this proceeding) which was adamantly opposed by other SMR licensees. The Commission also noted that "because specific elements of the Nextel proposal were not presented in the CMRS Further Notice, . . . [it deferred] adoption of final rules for 800 MHz SMR system and [required] a further notice of proposed rulemaking . . . to afford an opportunity for further public comment on specific alternatives."[43/] The Commission should do likewise and dismiss Nextel's Comments as beyond the scope of this proceeding.

37. It is well settled that an agency is remiss if it rushes to act on a proposal proposed by an interested party

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[43/] FNPRM at ¶ 11 (emphasis added).

without a full consideration of the interests of all of the affected parties. The pertinent section of the Administrative Procedure Act is Section 553(c), which provides:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection.

5 U.S.S. § 4(b). The courts have interpreted this provision as requiring an agency to take a "hard look" at the facts and issues surrounding the adoption of a final rule. The Commission cannot meet this obligation in this proceeding. As mentioned, Nextel's proposal is tantamount to a reallocation of the 800 MHz allocation rules under Part 90. The Commission's FNPRM did not envisage such an extraordinary step.

38. "The purpose of the rulemaking process . . . is to generate comments that will permit the agency to improve on the tentative rule announced in the nature of the rulemaking." AFL-CIO v. Donovan, 582 F. Supp. 1015, 1024

(D.D.C. 1984). "[T]he public must have an opportunity to comment on information that is material to an agency's decision in a rulemaking before the final rule is published." American Lithotripsy Society v. Sullivan, 785 F.Supp. 1034, 1036 (D.D.C. 1992) (emphasis in the original). This principle is especially true when dealing with arcane matters, such as Medicare law and medical procedures, as in American Lithotripsy, or telecommunications law and spectrum issues. In matters such as these, agencies cannot function properly without the benefit of comments from all interested parties. Id.[44/]

B. The New Nextel Proposal Will Stifle Rather Than Promote Competition

39. If the Commission decides to entertain Nextel's Comments and allow these Comments to become the agency's position, Southern and many other parties believe that

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[44/] One of the primary reasons for having a comment period is to provide an opportunity for "adversarial discussion among the parties" to the proceeding. Id.

It also should be noted that a court will not allow short congressional time frames to vitiate the requirement for fully reasoned decisions. In Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), the court stated that, despite the need for expediency, "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." Id. at 393.

competition will be stifled and the public thereby injured.[45/] Nextel even boldly admits in its Comments that it was the only viable entity that could survive an auction of 800 MHz SMR spectrum (because of its lock on SMR frequencies), stating that any other party who participates in the auction does so to intentionally increase the auction price for Nextel.[46/] In addition, its proposal to eliminate slow growth schedules in order to coerce channels out of bona fide SMR operators is draconian and should not be considered further by the Commission. The impact of this latest spin on the Nextel plan on both SMR and non-SMR 800 MHz licensees is truly anticompetitive and contrary to the public interest.

C. The "New SMR Spectrum Block" Ignores Current Spectrum Allocations and Creates Widespread Harm to Existing Licensees

40. As indicated above, the Nextel "new spectrum block" is a spectrum reallocation. Although some licensees operating on GC and Business channels are SMRs, there are many private land mobile users operating on these

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45/ See e.g., Comments of Thomas Luczak at 5, Parkinson Electronics Company, Inc. et. al. at 7, Supreme Radio Communications, Inc. at 3-5 and T&K Communications Systems, Inc. at 4.

46/ Comments of Nextel at 53-54.

frequencies as well, as the eligibility for these frequencies is fairly broad. Like the SMR channels, GC and Business frequencies are virtually all licensed as well. Certainly, critical private mobile radio systems, many operated by energy utilities, should not be suddenly forced off their frequency allocation to perpetuate the business plan of one SMR player, Nextel.

D. Nextel's Mandatory Relocation Plan is Unnecessary and Unfair

41. This proceeding is based upon a premise that the Commission itself recognizes is speculative at best.[47/] Nextel acknowledges that a 200 contiguous SMR channel block is not necessary to achieve a wide-area SMR system, but believes that such allocation is necessary to achieve regulatory parity.[48/] Many parties acknowledged that the concept of competing head-to-head with cellular service is speculative.[49/] Therefore, Southern believes that it is

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[47/] "We recognize that the proposed bifurcation of 800 MHz SMR spectrum described. . . is based on certain assumptions about the future development of SMR service. FNPRM at ¶ 19 (emphasis added).

[48/] See also, Comments of Motorola at 4-5. As discussed in detail above, regulatory parity for the sake of parity and at enormous cost to an entire industry is unwarranted and does not advance any greater public interest goals.

[49/] Comments of Fresno Mobile Radio, Inc. at 3, Applied Technology Group, Inc. at 1-2 and SMR WON at 1-2.

unnecessary to go through this painful exercise to achieve what only one company believes is necessary for its business plan.

42. The most insidious portion of Nextel's plan is the mandatory relocation of existing SMR licensees. It totally disregards the future of existing licensees and the needs of their end user customers. Nextel offers empty assurances that the relocated licensees will receive a comparable spectrum home. These assurances are speculative at best because there is no guarantee that spectrum will be available to relocate them. Moreover, Nextel's mandatory relocation is one-sided. Existing SMR licensees will only be relocated when and if the MTA licensee (presumably Nextel) chooses to force them out. Existing licensees should not have the threat of relocation looming over their heads. Southern believes that if the Commission were to go ahead with this ill-advised plan, an MTA licensee must relocate an incumbent if and when the incumbent requests relocation. Because of the uncertainty and inconvenience associated with relocation, Southern agrees with API that a "premium" must be paid to compensate for such inconveniences.[50/]

[50/] Comments of API at 4.

E. Nextel's Auction Plan Concedes Its Dominance and, If Implemented, Would Be a Travesty of the Commission's Auction Rules

43. Nextel's self-acknowledgement of its dominance within the industry pervades its Comments, but nowhere more so than in its discussion of the company's preferred auction methodology for MTA licensing. Nextel concedes that there is little, if any, 800 MHz SMR spectrum available for auction and that, notwithstanding the Commission's proposal to model SMR auctions after PCS auctions, there are significant differences between PCS licenses and wide-area SMR licenses.[51/] Importantly, Nextel states that the winner of an MTA auction may be acquiring nothing but a question mark "if that bidder is not an existing incumbent provider."[52/] (emphasis added.)

44. Unfortunately, Nextel draws the wrong conclusion from its listing of the stark facts that make a wide-area SMR auction an exercise in absurdity. Instead, Nextel concedes its overwhelming lock on the wide-area SMR industry by concluding, in effect, that any entity (other than Nextel) that might want to bid for wide-area SMR spectrum is

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51/ Comments of Nextel at 52.

52/ Comments of Nextel at 52, note 105.

an auction greenmailer intent only on obstructing Nextel's path by forcing Nextel to pay more (than it might otherwise) for spectrum that it believes it already virtually controls.[53/]

F. Nextel's Auction Plan Violates the Auction Statute and Commission Auction Rules

45. Nextel's auction plan suggests that existing Commission rules that facilitate the participation of "Designated Entities" in the broadband Personal Communications Service are sufficient to ensure the participation of designated entities in the Commercial Mobile Radio Services.[54/] Hence, according to Nextel, a designated entity entrance provision is not necessary for wide-area SMR auctions.

46. Assuming only for the sake of argument that a wide-area SMR auction is practicable, how ironic it is that in one of the few telecommunications industry sectors where there is significant small business representation, that Nextel would not want to foster participation by small businesses and minority entities. The Commission's auction

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[53/] Comments of Nextel at 53-54.

[54/] Comments of Nextel at 54-55.

authority contained in the Omnibus Budget Reconciliation Act states that one of the underlying goals of any auction process must be

> "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily available to the American people by avoiding excess concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[55/]

47. Emphasizing its almost proprietary approach to MTA auctions, Nextel's proposal suggests a range of competitive bidding rules and procedures that will serve to stifle participation by any party other than Nextel. Nextel supports the imposition of a number of competitive bidding procedures familiar from PCS auctions including a two cents per MHz per unit of population down payment, minimum bid increments and simultaneous stopping rules. Having laid down these basic rules, however, Nextel goes on to propose a number of other competitive bidding procedures designed simply to ratify the fact that there is no "spectrum" to be auctioned, and that Nextel is the sole industry player having a viable economic stake in MTA licensing on Nextel's terms.

55/ 47 USC § 309 (j)(3)(B)

48. Nextel's upfront payment plan for the MTA auction is emblematic of its approach. Living in fear that an entity (whether it be AT&T or an SMR is hard to tell) may have the temerity to impede its path to total wide-area SMR industry dominance, Nextel urges that a larger than usual upfront payment be required for entrance to the MTA auction, even to the extent that the payment be based on 200-channel bidding, even if the Commission were only to offer 50-channel blocks.[56/]

49. Should any entity survive Nextel's upfront payment proposal, Nextel proposes the erection of further barriers to any party that may not know, as Nextel says it does, "that a particular incumbent must obtain that license."[57/] (emphasis in original.) Traditional withdrawal penalties require that a withdrawing bidder pay the difference between the withdrawn bid and the next-highest bid. Traditional penalties, however, do not sit well as far as Nextel is concerned. Nextel would add additional penalties, such as forfeiture of the bad actor's upfront payment, to further assure that auction participation is limited.

56/ Nextel at 57.

57/ Nextel at 57-58.

50. Southern urges that, instead of acquiescing to Nextel's fears of auction greenmailers, the Commission must recognize an MTA auction (whether of Nextel's design or anyone else's) would not be an auction in any real sense of the term. Simply, there is no real "spectrum" available to auction, and that spectrum which may be available exists in an environment totally dominated by Nextel and its affiliated entities. Hence, the Commission is not auctioning something that is of equal potential value to each bidder. For Southern, the solution is not adoption of Nextel's auction proposal, but rather an abandonment of the Commission's ill-conceived proposal for MTA auctions.

V. LACK OF CONSENSUS IN COMMENTS ARGUES FOR MAINTAINING CURRENT PROCEDURES

51. Several points are clear. First, the SMR industry lacks a consensus on the best manner in which to license wide-area and local 800 SMR systems. Second, virtually all SMR licensees oppose the Nextel plan, as proposed in the FNPRM, and as the Reply Comments will show, as proposed in Nextel's Comments. Accordingly, the Commission cannot possibly adopt the licensing rules for wide-area 800 MHz SMR industry proposed. Southern believes the best way to achieve the wide-area concept is to allow existing SMR licensees to apply for wide-area status giving these

licensees the right to re-use their frequencies throughout their self-defined service areas while protecting incumbents. No massive reallocation of spectrum or relocation of incumbents is necessary since this can already take place on an as needed basis as the market dictates.[58/]

52. At a minimum, the Commission must maintain the status quo until the SMR industry reaches a consensus regarding the proposals advanced in the FNPRM and Nextel's Comments. With the major source of contention being how best to handle incumbent licensees, Southern cannot envision any satisfactory remedy for all parties on the horizon.

CONCLUSION

53. Southern sees no industry consensus regarding the proposals advanced in this proceeding. The divergent views expressed in Comments evidences the uncertainty in the SMR

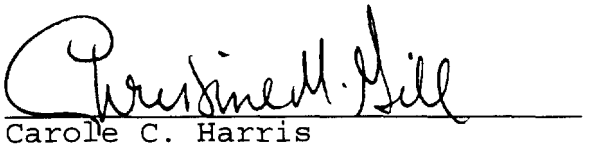
[58/] Southern understands that the Commission desires to eliminate the site-specific licensing because of the drain on Commission resources used to process these applications. Nevertheless, with the backlog of applications processed through the new software package, the Commission anticipates granting licensees as early as April 1, 1995. This same software can be used to license any future applications. Moreover, application fees, regulatory fees and tax dollars should adequately cover the expense to process these applications. Since there will be no need to conduct auctions for SMR service, resources could be devoted to any future application processing.

industry regarding licensing wide-area SMR systems. Nextel's Comments advocating a spectrum reallocation are beyond the scope of this proceeding, and warrant dismissal. Unless and until the SMR industry can reach a consensus on how to proceed with the future development of 800 MHz SMR systems, the Commission must abandon this approach and continue licensing SMR systems under the current FCC rules. To do more than this, at this juncture, will unnecessarily disrupt an established industry and the public it serves.

WHEREFORE THE PREMISES CONSIDERED, The Southern Company respectfully requests that the Commission act upon its Further Notice of Proposed Rule Making in manner consistent with the views expressed herein.

Respectfully submitted,

THE SOUTHERN COMPANY

By: 

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